Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

No. 74-476

In the Supreme Court of the United States

OCTOBER TERM, 1974

WILLIE PENN, ET AL., PETITIONERS
v.
JAMES R. SCHLESINGER, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
ROBERT E. KOPP,
JAMES C. HAIR, Jr.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional, statutory, and regulatory provisions involved	2
Statement	2
Argument	9
Conclusion	20
Statutory appendix	21

CITATIONS

Cases:

Beale v. *Blount*, 461 F. 2d 1133	7, 19
Caldwell v. *National Brewing Co.*, 443 F. 2d 1044, certiorari denied, 405 U.S. 916	19
Christian v. *New York Department of Labor*, 414 U.S. 614	18
Damico v. *California*, 389 U.S. 416	19
Dugan v. *Rank*, 372 U.S. 609	5, 6
Dunham v. *Crosby*, 435 F. 2d 1177	19
Eisen v. *Eastman*, 421 F. 2d 560, certiorari denied, 400 U.S. 841	19
Hadnott v. *Laird*, 463 F. 2d 304	18, 19
Houghton v. *Shafer*, 392 U.S. 639	19
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	5, 6
McKart v. *United States*, 395 U.S. 185	8, 9, 13, 14
McNeese v. *Board of Education*, 373 U.S. 668	18, 19
Monroe v. *Pape*, 365 U.S. 167	19

Cases—Continued

	Page
Sampson v. *Murray*, 415 U.S. 61	18
Wilwording v. *Swenson*, 404 U.S. 249	19
Young v. *International Telephone & Telegraph Co.*, 438 F. 2d 757	19

Constitution, statutes and regulations:

United States Constitution:	
Fifth Amendment	2, 3, 4, 21
Thirteenth Amendment	3
Civil Rights Act of 1870, 16 Stat. 144 42 U.S.C. 1981	2, 3, 4, 5, 7, 8–9, 16, 17, 18
Equal Employment Opportunity Act of 1972, 86 Stat. 111, Section 717, 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16	2, 5, 11, 12, 17, 19, 21
Civil Rights Act of 1964, 78 Stat. 253, Section 701, 42 U.S.C. 2000e(b)	9–10, 12, 17, 19
Civil Rights Act of 1964, 78 Stat. 253, Title VII, as amended, 42 U.S.C. 2000e, *et seq.*:	
42 U.S.C. 2000e	19
42 U.S.C. 2000e–5(e)	12, 25
42 U.S.C. Supp. III, 1973 ed. 2000e–16	2, 11, 17, 19, 21
42 U.S.C. Supp. III, 1973 ed. 2000e–16(c)	5, 12
42 U.S.C. Supp. III, 1973 ed. 2000e–16(e)	12
5 U.S.C. 7151	2, 10, 16, 25
28 U.S.C. 1292(b)	6
28 U.S.C. 1331	3
28 U.S.C. 1343(4)	3
28 U.S.C. 1346(a)(2)	3
28 U.S.C. 1361	3
28 U.S.C. 2201	3
5 C.F.R. Part 300	29
5 C.F.R. Part 713	2, 10, 34
5 C.F.R. 713.251	8, 16

Miscellaneous:

	Page
Executive Order 11246, 30 Fed. Reg. 12319	2, 10
Executive Order 11478, 34 Fed. Reg. 12985	3, 4, 5, 10, 26
Executive Order 11590, 36 Fed. Reg. 7831	3, 10, 26
H. Rep. No. 92–238, 92d Cong., 1st Sess.	10
S. Rep. No. 92–415, 92d Cong., 1st Sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-476

WILLIE PENN, ET AL., PETITIONERS

v.

JAMES R. SCHLESINGER, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc* (App. 1a–12a), is reported at 497 F. 2d 970. The original panel opinion of the court of appeals (App. 13a–45a) is reported at 490 F. 2d 700. The order of the district court (App. 47a–61a) is reported at 350 F. Supp. 752.

JURISDICTION

The judgment of the court of appeals, sitting *en banc,* was entered on July 26, 1974. The petition for a writ of certiorari was filed on October 23, 1974. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit brought by two individual employees of the federal government and others similarly situated and by the Alabama NAACP charging 17 federal agencies with systematic discrimination in the employment and promotion of blacks in Alabama, the allegations that one individual plaintiff was unaware of available administrative remedies and the other was discouraged from proceeding administratively are sufficient grounds for allowing maintenance of the suit without a prior exhaustion of available administrative remedies.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and the pertinent provisions of the Civil Rights Act of 1870, 16 Stat. 144, 42 U.S.C. 1981; the Equal Employment Opportunity Act of 1972, 86 Stat. 111, amending Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16; and 5 U.S.C. 7151; together with Executive Order 11478, 34 Fed. Reg. 12985, and the Employment (Part 300 of 5 C.F.R.) and Equal Opportunity Regulations (Part 713 of 5 C.F.R.), are set forth in a Statutory Appendix (hereinafter "Stat. App."), *infra,* pp. 21–67.

STATEMENT

The named petitioners are Willie Penn and Charles Foster—two federal employees who claim that they have been discriminated against by their employer,

the Department of Defense (DOD)—and the Alabama State Conference of the NAACP, Inc. They brought this suit on behalf of themselves, the organization's membership, and "all blacks in Alabama similarly situated" (App. 66a) against the United States and the individuals heading seventeen separate federal agencies employing persons in Alabama, including DOD.[1]

In their complaint, as amended,[2] petitioners alleged that: (1) Penn and Foster, both civilian employees of DOD at Maxwell Air Force Base, Alabama, have been denied promotions or advancement solely because of their race (App. 82a–85a); (2) Penn's white supervisor, to whom he had repeatedly made known his desire for advancement, had failed to inform him of his right to file a complaint with an Equal Employment Opportunity Officer, in breach of her legal duty (App. 96a–97a); and (3) Foster's white supervisors, including an Equal Employment Opportunity

[1] The federal agency heads sued were the Secretaries of the Departments of Defense, Treasury, Interior, Agriculture, Commerce, Labor, Health, Education and Welfare, Housing and Urban Development, and Transportation; the Attorney General; the Postmaster General; the Directors of the General Services Administration and the Selective Service System; the Comptroller General; the Chairmen of the Railroad Retirement Board and the National Aeronautics and Space Administration and the Administrator of the Small Business Administration (App. 69a–74a).

[2] Petitioner Foster was brought into the action by amendment to the complaint (App. 95a–103a). Jurisdiction was alleged under the Fifth and Thirteenth Amendments to the United States Constitution; 42 U.S.C. 1981; 28 U.S.C. 1331, 1343(4), 1346(a)(2), 1361 and 2201; and Executive Order 11478, 34 Fed. Reg. 12985, as amended by Executive Order 11590, 36 Fed. Reg. 7831 (Stat. App., *infra*, pp. 21–67). An amount in excess of $10,000 was alleged to be involved (App. 65a).

Counselor to whom he had repeatedly complained about his lack of advancement, had discouraged him from prosecuting his complaint administratively by advising, for example, "that he would have to file a suit if he expected to carry his complaint further" (App. 97a–102a). They further alleged that all respondent federal agencies have "engaged in a systematic practice of racial discrimination in employment of blacks in Alabama", and that the statutory and constitutional rights of all Alabama blacks have been violated by the failure of federal agencies "to effectively recruit blacks in Alabama for employment * * *" and by the agencies' use of "employment entrance tests * * * where blacks scored lower than whites on the average and where such tests had not been validated to job performance * * *" (App. 79a–87a).[3]

As relief, petitioners requested: (1) declarations that respondents had violated 42 U.S.C. 1981 by engaging in "a practice of denial of equal right to contract with blacks in Alabama in employment * * *", the Fifth Amendment by engaging in a practice of systematic discrimination against blacks in employment, and Executive Order 11478;[4] and (2) orders

[3] Plaintiffs cited numerous statistics in support of these allegations, which purport to show generally that the percentage of blacks employed by the federal government in Alabama is approximately 2.6%, whereas the black population in Alabama is approximately 26.4% (App. 74a–82a, 89a–94a).

[4] Executive Order 11478 directed the establishment of a comprehensive administrative scheme for insuring equal employment opportunities in the federal government (see Stat. App., *infra*, p. 26).

compelling defendant agencies to perform their duty under Executive Order 11478, requiring the agencies "to institute a practice of hiring one black for every one white hired until the ratio of blacks in defendants' Federal jobs in Alabama is approximately in proportion to the percentage of blacks in Alabama's population", and requiring DOD to promote Penn and Foster immediately (Penn to a GS–11 level and Foster to at least a GS–5 level rating) and to pay them the salary they would have received, with interest, had they not been denied promotion on account of race (App. 86a–87a, 102a–103a).

Respondents moved to dismiss the suit on the grounds of failure to exhaust administrative remedies and of sovereign immunity, except as waived in Section 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp III, 1973 ed.) 2000e–16(c). Petitioners opposed dismissal on the alternative grounds, among others, that Penn and Foster had sufficiently exhausted their administrative remedies because their agency had failed to advise them that they could file administrative complaints alleging discrimination or that exhaustion of administrative remedies is not a prerequisite to maintaining an action under 42 U.S.C. 1981.

On grounds of sovereign immunity, the district court granted respondents' motion to dismiss as to the United States (App. 49a–55a). However, the court denied the motion to dismiss as to respondent agency heads, finding that petitioners' allegations against them fell within the *Larson-Dugan* exception to the

doctrine of sovereign immunity [5] (App. 56a–57a) and that the individual petitioners had adequately exhausted their administrative remedies (App. 57a–60a). With regard to the requirement of exhaustion, no mention was made by the court of the Alabama NAACP.[6] The court also authorized petitioners, upon the expiration of fifteen days, to proceed with their discovery (App. 61a).

Together with its order, the district court issued the certificate necessary for prosecution of an interlocutory appeal under 28 U.S.C. 1292(b) (App. 46a). The court of appeals granted respondents leave to take such an appeal [7] and ordered that all further proceedings before the district court in the case be stayed pending final disposition of the appeal.[8]

A divided panel of the court of appeals affirmed the order of the district court. The court first held that petitioners' allegation that the federal government

[5] See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609.

[6] The district court found it unnecessary to rule on whether 42 U.S.C. 1981 "runs against federal officers" (App. 55a, n. 3).

[7] Respondents limited their application for leave to take an interlocutory appeal to two issues: (1) the exhaustion of administrative remedies question; and (2) whether the relief sought by the complaint is barred by the doctrine of sovereign immunity. Respondents, however, never briefed or argued the latter issue in the court of appeals and have not argued on appeal that the doctrine of sovereign immunity bars suits for racial discrimination in employment against them or the United States.

[8] Thus, appeal was authorized before respondents had filed an answer to the complaint and before the issue of the propriety of petitioners' maintaining a class action in the circumstances alleged and the definition of the class had been litigated.

violated their contract rights on account of race does state a cause of action under 42 U.S.C. 1981 that is not barred by the doctrine of sovereign immunity and for which relief in the nature of mandamus is available (App. 15a–23a). Then, confining its analysis of the exhaustion of administrative remedies issue solely to the two individual petitioners, without reference either to petitioner NAACP or the class which the individual petitioners purport to represent, the court held that all petitioners had sufficiently exhausted their administrative remedies (App. 23a–28a). The court based this holding on the individual petitioners' allegations that they had not been advised of their administrative remedies, or had been misled as to the availability of such remedies by their DOD supervisors (*ibid.*).[9]

The dissenting judge, observing that "[t]his is not run of the mill litigation but potentially a massive case" (App. 29a), found petitioners' allegations in-

[9] The panel majority found binding the distinction drawn in *Beale* v. *Blount*, 461 F. 2d 1133, 1138–1139 (C.A. 5), between federal court actions under 42 U.S.C. 1981 against federal officials and such actions against state agencies or officials. Accordingly, the majority stated that "[w]e cannot accept appellant's [*sic*—appellees'] argument * * * that we equate the present suit with one in which a Section 1981 plaintiff may deliberately bypass administrative remedies under Title VII of the Civil Rights Act" (App. 24a, n. 11). The concurring opinion, however, stated that "it seems clear from existing precedent that in an action under the Civil Rights Act of 1866, 42 U.S.C. 1981 *et seq.*, exhaustion of administrative remedies is not required" and recommended that the circuit "take the earliest opportunity to rationalize and make consistent this confusing area of the law" (App. 28a–29a).

sufficient to permit them to avoid exhausting available administrative remedies as a prerequisite to their suit (App. 29a–45a). He was of the opinion that the policies underlying adherence by the courts to the exhaustion requirement discussed in *McKart* v. *United States*, 395 U.S. 185, 193–195, were disserved by the majority decision allowing petitioners to bypass the administrative remedies available to them (App. 41a).

Thereafter, respondents timely petitioned for, and were granted, rehearing *en banc* (490 F. 2d at 714). The full court of appeals concluded, for the reasons set forth in the opinion of the dissenting member of the original panel (which the court *en banc* thus adopted as its own), "that the claims of the individual plaintiffs should have been dismissed for failure to exhaust administrative remedies" (App. 2a). Moreover, finding that the Alabama NAACP "now has an administrative remedy under amended regulations adopted shortly after the District Court denied the motion to dismiss," the court concluded that "under the circumstances of this case it too should be required to exhaust" (App. 2a, n. 1).[10] Accordingly, the case was remanded to the district court with instructions to dismiss (App. 3a). Four judges dissented (App. 3a–12a) on the grounds that exhaustion of administrative remedies is not a prerequisite to a suit under 42 U.S.C.

[10] The court's reference was to 5 C.F.R. 713.251 which now sets out procedures for allegations of discrimination made by organizations or other third parties. Under the regulation, the party submitting the allegation shall be notified of the agency's decision on the allegation and may appeal the agency decision to the Civil Service Commission. See 5 C.F.R. 713.251(b) and (c).

1981 against federal officials and that, in any event, on the facts of this case the requirement has either been satisfied or should be excused (*ibid.*).

ARGUMENT

The *en banc* decision of the court of appeals is correct. It is consistent with the requirements of current law governing federal employment discrimination suits and properly applies the principles of the exhaustion of administrative remedies doctrine summarized by this Court in *McKart* v. *United States*, *supra*. Review by this Court is therefore not warranted.

1. Petitioners contend that the effectiveness of the administrative complaint process for federal employment discrimination will be promoted by a reversal of the *en banc* decision of the court of appeals, which they assert (Pet. 12–13) has both frustrated the congressional goal of eliminating discrimination in federal employment "by refusing to police the administrative process" and undermined the effectiveness of that administrative complaint process "by sanctioning the wrong-doing of administrative officers and counselors." But a consideration of the governing statutes and the circumstances of this case demonstrate otherwise.

a. In enacting the Civil Rights Act of 1964 Congress, while expressly excluding the United States from coverage as an "employer" for purposes of the Equal Employment Opportunities subchapter (Title VII), provided "[t]hat it shall be the policy of the United States to insure equal employment opportuni-

ties for Federal employees without discrimination because of race, color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy."[11] This policy was implemented with the promulgation in 1965 of Executive Order 11246, 30 Fed. Reg. 12319, which directed, *inter alia,* that the Civil Service Commission provide agencies with guidance and supervision in the development of Equal Employment Opportunity affirmative action programs and that it issue regulations providing aggrieved employees and applicants for employment with administrative remedies, including the opportunity for impartial agency review of their complaints and appeal to the Commission.[12] Regulations establishing such a remedial scheme were thereafter promulgated and have since been revised periodically by expansion of the relief available. See 5 C.F.R. Part 713.

In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964. The Committee on Education and Labor of the House of Representatives stated in its report:[13]

> Despite the series of executive and administrative directives on equal employment opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved Federal employee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available. * * *

[11] Pub. L. 88–352, Section 701, 78 Stat. 253, formerly 42 U.S.C. 2000e(b). In 1966, this statement of policy was deleted from the Civil Rights Act and incorporated, with insubstantial changes, into that part of the Code covering federal employees, at 5 U.S.C. 7151.

[12] Executive Order 11246 was amended by Executive Order 11478, 34 Fed. Reg. 12985, and Executive Order 11590, 36 Fed. Reg. 7831.

[13] H. Rep. No. 92–238, 92d Cong., 1st Sess., p. 23.

Similarly, the Committee on Labor and Public Welfare of the Senate stated in its report:[14]

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. * * *

Adding a new Section 717 to the Civil Rights Act of 1964, 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16, which became effective March 24, 1972, Congress (1) declared that the federal competitive service "shall be made free from any discrimination based on race, color, religion, sex, or national origin"; (2) authorized and directed the Civil Service Commission to supervise and enforce the statute "through appropriate remedies, including reinstatement or hiring of employees with or without back pay"; and (3) provided that an aggrieved

[14] S. Rep. No. 92–415, 92d Cong., 1st Sess., p. 16.

employee or applicant for employment may institute a civil action against the head of his department, agency or unit within 30 days of receipt of notice of final action by a department or agency or by the Civil Service Commission on appeal, or if no action has been taken, after 180 days from the filing of the initial charge with the department or agency or with the Civil Service Commission on appeal. In adding these provisions to Title VII of the Civil Rights Act of 1964, Congress stated that "[n]othing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government." 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16(e).

Congress has therefore not authorized direct enforcement actions in the courts in federal employment discrimination cases, without prior exhaustion by complainants of prescribed administrative remedies. Had it intended otherwise, it would not have excluded the federal government and its agencies from the purview of Title VII of the Civil Rights Act of 1964, which provides a judicial remedy for non-federal employees alleging discriminatory practices by their employer. See 42 U.S.C. 2000e–5(e).[15] Nor would it, in converting the federal nondiscrimination policy into a statutory requirement by amendment of Title VII, have

[15] The exclusion of the United States from coverage as an "employer" for purposes of Title VII continues in effect. See 42 U.S.C. 2000e(b).

continued to make federal agencies primarily responsible for implementing equal employment opportunities or required exhaustion of prescribed administrative remedies as a prerequisite to filing suit.

b. The decision of the court of appeals is entirely consistent with the congressional policy embodied in these statutes and with the general principle that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart* v. *United States, supra,* 395 U.S. at 193. Moreover, it is clear on the facts of this case, as documented in the opinion adopted by the court *en banc* (App. 29a–45a), that to allow the judicial proceedings to continue without a prior resort by all petitioners to the administrative process would have significantly harmful effects: First, the Civil Service Commission would be impeded in the exercise of its authority to compel federal agencies to meet their statutory duty to rectify discriminatory employment practices. *McKart* v. *United States, supra,* 395 U.S. at 193. Second, premature involvement of the courts would hamper the achievement of uniformity in the resolution of complaints of discrimination within the federal government. *Id.* at 193–95. Third, petitioners, respondents and the courts all would be deprived of the Commission's expertise, accumulated over the past decade, and assistance in resolving the complaints and eliminating their underlying causes. *Id.* at 194. Finally, requiring compliance with the exhaustion requirement here is important to judicial economy since it will allow petitioners' complaints

568-796—75——2

either to be successfully resolved administratively or to be scaled down to more manageable dimensions. *Id.* at 195.

By contrast, the decisions of the district court and the court of appeals' panel would have entertained petitioners' sweeping judicial challenge to the employment practices of all seventeen respondent federal agencies based solely on the two individual petitioners' allegations that they were not properly advised as to the availability of administrative remedies by subordinate officials of their agency. Such a judicial resolution, which in effect constituted a reprimand of virtually the entire federal establishment in Alabama for what was at most the errors of one agency's subordinate personnel, was overbroad and inconsistent with the exhaustion doctrine. As noted in the court of appeals' *en banc* opinion (App. 33a):

> The narrow fulcrum employed to lever this plenary inquiry out of institutional channels and into the federal court system consists of vague and unverified allegations by two individuals employed by a single federal agency (and at one location) concerning informal remarks alleged to have been made to them by two (or three) other government employees designated as EEO "counselors" or "officers." Seldom was so small a camel's nose employed to drag so large a camel into the tent.

2. Petitioners further contend that the court of appeals erred in requiring them to exhaust administrative remedies because: (1) they had already resorted to the existing administrative remedies which had

proved futile; and (2) the remedies which did exist did not contemplate an appeal to the Commission by Penn and Foster of their agency's refusal to process their complaints (Pet. 15–18). Both contentions were properly rejected by the full court of appeals. With respect to the individual petitioners' alleged attempts at exhaustion, the court pointed out that (App. 43a):

> The material in the complaint bearing on plaintiffs' informal contacts with Maxwell [Air Force Base] personnel designated as EEO officials was added by amendment after exhaustion surfaced as an issue and in an effort to allege frustration. But neither plaintiff has alleged that he lacked actual knowledge of his right to file a formal administrative complaint, or that his failure to proceed further in administrative channels was in fact caused by the remarks made to him. I can find nothing in the amended complaint to support the District Court's conclusion that plaintiffs' failure to go farther was solely due to the misbehavior of others. Rather, the pleadings do not exclude the possibility that plaintiffs knew of the procedures available to them and determined to repair to the court as an advised choice.

The court *en banc* also noted that, when Penn and Foster purportedly attempted to exhaust their administrative remedies, the Civil Service Commission was under Executive order to ensure that all agencies provided for the prompt, fair and impartial consideration of employment discrimination complaints (App. 37a–38a, n. 1) and that the Commission's 1971 regulations required agencies, if attempts at informal

resolution of such a complaint failed, to notify the complainant in writing of its proposed disposition of his complaint and of his right to a full evidentiary hearing before an impartial examiner (App. 39a). Thus, while the 1971 regulations did not expressly provide for Commission review of an agency's failure to comply with the regulations, there can be little doubt that had petitioners brought any alleged noncompliance by their agency to the Commission's attention, the Commission would have taken appropriate corrective action.[16]

3. Finally, petitioners urge this Court to resolve the question whether available administrative remedies must be exhausted before an employment discrimination suit can be instituted under 42 U.S.C. 1981 against the federal government or its officers (Pet. 18–22). However, that question neither is open to ser-

[16] Nor is certiorari warranted because the 1971 regulations did not provide for the filing of complaints by organizations such as the NAACP (Pet. 18, n. 23). As the court *en banc* noted (App. 40a–41a, n. 3), those regulations were amended in October 1972, just after the district court had ruled, to provide for the filing with an agency of "general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint * * *", and for their investigation and resolution by the agency. See n. 10, *supra*. An organization or third party filing such allegations also may appeal the agency decision to the Civil Service Commission (5 C.F.R. 713.251). The full court of appeals therefore correctly concluded that, now that the NAACP has an administrative remedy, and particularly in the circumstances of this case, it too should be required to exhaust before proceeding with a suit in the district court (App. 2a, n. 1).

ious dispute nor presently merits this Court's attention.

42 U.S.C. 1981 does not deal specifically with the problem of discrimination in employment by the federal government. The only time Congress has expressly legislated a judicial remedy for federal employment discrimination was in 1972 when it enacted 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16(c). Then, confirming its support for the anti-discrimination policies of the Civil Service Commission undertaken in implementing 5 U.S.C. 7151, Congress carefully adopted the requirement of exhaustion of the administrative remedies prescribed by the Equal Opportunity Regulations. In short, in the only two statutes enacted to deal specifically with federal employment discrimination—5 U.S.C. 7151 (formerly 42 U.S.C. (1964 ed.) 2000e(b)) and 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16—direct enforcement actions have been precluded by Congress.

Permitting direct actions under 42 U.S.C. 1981 (or any other statute) against the federal government or its officers for alleged employment discrimination would thus place that statute in irreconcilable conflict with the remedial requirements of 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16, which were designed to effectuate a congressional intent that departments and agencies of the federal government be directly responsible for eliminating employment discrimination and that federal employees present their complaints of discrimination to their employing agencies before resorting to the courts. By contrast, a holding that direct

actions are permissable under 42 U.S.C. 1981 would likely result in the bringing directly to the courts of many federal employment discrimination grievances, which might otherwise be resolved administratively, thereby inappropriately burdening the federal judiciary

These adverse consequences are correctly avoided by the decision below, which is consistent with that of the only other court of appeals, the District of Columbia Circuit, which has considered the question whether available administrative remedies must be exhausted as a prerequisite to suit against federal officials for alleged employment discrimination. See *Hadnott* v. *Laird,* 463 F. 2d 304 (C.A.D.C.). Moreover, this Court only recently has reached a similar result in suits against federal officials involving other employee rights and benefits. *Christian* v. *New York Department of Labor,* 414 U.S. 614; *Sampson* v. *Murray,* 415 U.S. 61.

Adherence to the exhaustion doctrine in employment discrimination suits brought against federal officials under 42 U.S.C. 1981 does not require federal employees or applicants for federal employment to resort to inadequate remedies (*McNeese* v. *Board of Education,* 373 U.S. 668, 674–676) or to do a futile act (*Houghton* v. *Shafer,* 392 U.S. 639, 640).[17] The Equal Opportunity regulations, which are the product

of years of improvement, provide a comprehensive administrative scheme for remedying both individual and systematic employment discrimination practices within the federal government.[18] Those regulations now provide for relief which could fully satisfy the demands of all petitioners (see App. 40a–41a, n. 3).[19]

---

[17] Because a specific federal remedy is thus provided, the decisions of this Court holding that exhaustion of state remedies is not a prerequisite to suits under the federal civil rights laws against state governmental entities or officials—see, *e.g.*, *Damico* v. *California*, 389 U.S. 416; *McNeese* v. *Board of Education*, *supra*; *Houghton* v. *Shafer*, *supra*; *Wilwording* v. *Swenson*, 404 U.S. 249; *Monroe* v. *Pape*, 365 U.S. 167, 180–183—are inapposite. See *Eisen* v. *Eastman*, 421 F. 2d 560, 568–569 (C.A. 2), certiorari denied, 400 U.S. 841; *Beale* v. *Blount*, 461 F. 2d 1133, 1139 (C.A. 5); *Hadnott* v. *Laird*, *supra*, 463 F. 2d at 309; *Dunham* v. *Crosby*, 435 F. 2d 1177, 1180 (C.A. 1).

[18] Those regulations are discussed in detail in the opinion below (App. 37a–40a).

[19] Decisions in civil rights suits against private employers are also inapposite because of the greater indicia that the administrative remedy here provided was intended to be exclusive. The Fifth and Third Circuits have held that nothing in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, providing remedies before the Equal Employment Opportunity Commission and in the courts for alleged discrimination by certain private employers (those having a prescribed minimum number of employees) affecting interstate commerce, "either expressedly or impliedly imposes any jurisdictional barrier to a suit brought under § 1981." *Caldwell* v. *National Brewing Company*, 443 F. 2d 1044, 1046 (C.A. 5), certiorari denied, 405 U.S. 916; *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757, 760–764 (C.A. 3). This is in sharp contrast to the comprehensiveness of 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
ROBERT E. KOPP,
JAMES C. HAIR, JR.,
Attorneys.

FEBRUARY 1975.

STATUTORY APPENDIX

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law;

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 111, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. III, 1973 ed.) 2000e–16, provides in pertinent part:

> § 2000e–16 EMPLOYMENT BY FEDERAL GOVERNMENT—DISCRIMINATORY PRACTICES PROHIBITED; EMPLOYEES OR APPLICANTS FOR EMPLOYMENT SUBJECT TO COVERAGE
>
> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service

and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

CIVIL SERVICE COMMISSION; ENFORCEMENT POWERS; ISSUANCE OF RULES, REGULATIONS, ETC.; ANNUAL REVIEW AND APPROVAL OF NATIONAL AND REGIONAL EQUAL EMPLOYMENT OPPORTUNITY PLANS; REVIEW AND EVALUATION OF EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS AND PUBLICATION OF PROGRESS REPORTS; CONSULTATIONS WITH INTERESTED PARTIES; COMPLIANCE WITH RULES, REGULATIONS, ETC.; CONTENTS OF NATIONAL AND REGIONAL EQUAL EMPLOYMENT OPPORTUNITY PLANS; AUTHORITY OF LIBRARIAN OF CONGRESS

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit an order to

maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

CIVIL ACTION BY EMPLOYEE OR APPLICANT FOR EMPLOYMENT FOR REDRESS OF GRIEVANCES; TIME FOR BRINGING OF ACTION; HEAD OF DEPARTMENT, AGENCY, OR UNIT AS DEFENDANT

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsecsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the dedepartment, agency, or unit, as appropriate, shall be the defendant.

SECTION 2000e–5 (f) THROUGH (k) OF THIS TITLE APPLICABLE TO CIVIL ACTIONS

(d) The provisions of section 2000e–5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

GOVERNMENT AGENCY OR OFFICIAL NOT RELIEVED OF RESPONSIBILITY TO ASSURE NONDISCRIMINATION IN EMPLOYMENT OR EQUAL EMPLOYMENT OPPORTUNITY

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Section 7151 of 5 U.S.C. provides:

SUBCHAPTER II.—ANTIDISCRIMINATION IN EMPLOYMENT

§ 7151 POLICY

It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 523.)

Historical and revision notes

Derivation	United States Code	Revised statutes and statutes at large
----------	42 U.S.C. 2000 e(b) (2d proviso).	July 2, 1964, Public Law 88–352. § 701(b) (2d proviso), 78 Stat. 254.

The word "Federal" is omitted as unnecessary in view of the definition of "employee" in section 2105.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Executive Order 11478, as amended by E.O. 11590, provides:

EXECUTIVE ORDER 11478—EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT [AS AMENDED]

SOURCE: Executive Order 11478, 34 F.R. 12985, Aug. 12, 1969, as amended by the following: E.O. 11590, 36 F.R. 7831, Apr. 27, 1971.

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national original. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

Now, therefore, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral

part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall

review and evaluate agency prog..am operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and

judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

SEC. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.

[Sec. 8 added by E.O. 11590, 36 F.R. 7831, Apr. 27, 1971]

The Employment Regulations, Part 300 of 5 C.F.R., provide in pertinent part:

PART 300—EMPLOYMENT (GENERAL)

SUBPART A—EMPLOYMENT PRACTICES

Sec.

300.101 Purpose.
300.102 Policy.
300.103 Basic requirements.
300.104 Appeals, grievances and complaints

SUBPART B—[RESERVED]

SUBPART C—COMMISSION APPROVAL IN FILLING POSITIONS IN GS–16 AND ABOVE

300.301 Commission approval in filling positions in GS–16 and above.

SUBPART D—CEILING ON PERMANENT EMPLOYEES

300.401 Limitations on career appointments and conversions.

568-796—75——3

SUBPART E—OBLIGATED POSITIONS

300.501 Definitions.
300.502 Restriction on filling obligated position on permanent basis.

SUBPART F—TIME-IN-GRADE RESTRICTIONS

300.601 Applicability.
300.602 Restrictions.
300.603 Exceptions to restrictions.
300.604 Periods of creditable service.
300.605 Other time restrictions.

SUBPART G—[RESERVED]

SUBPART H—[RESERVED]

SUBPART I—EMPLOYMENT OF SUBSTITUTES IN THE FIELD SERVICE OF THE POST OFFICE DEPARTMENT

300.901 Temporary appointment of substitutes in the postal field service.
300.902 Change of substitutes to regulars in the postal field service.

AUTHORITY: The provisions of this Part 300 issued under 5 U.S.C. Secs. 3301, 3302, E.O. 10577; 3 CFR, 1954–1958 Comp., p. 218, unless otherwise noted. Secs. 300.101–300.104 also issued under 5 U.S.C. Secs. 7151, 7154; E.O. 11478; 3 CFR, 1969 Comp.

SOURCE: The provisions of this part 300 appear at 33 F.R. 12412, Sept. 4, 1968, unless otherwise noted.

SUBPART A—EMPLOYMENT PRACTICES

SOURCE: The provisions of this Subpart appear at 36 F.R. 15447, Aug. 14, 1971, unless otherwise noted.

§ 300.101 PURPOSE

The purpose of this subpart is to establish principles to govern, as nearly as is administratively feasible and practical, the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service or in positions in the government of the District of Columbia required to be filled in the same manner that positions in the competitive service are filled. For the purpose of this subpart, the term "employment practices" includes the development and use of examinations, qualification standards, tests, and other measurement instruments.

§ 300.102 POLICY

This subpart is directed to implementation of the policy that competitive employment practices:

(a) Be practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of candidates for the jobs to be filled:

(b) Result in selection from among the best qualified candidates:

(c) Be developed and used without discrimination because of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit grounds; and

(d) Insure to the candidate opportunity for appeal or administrative review, as appropriate.

§ 300.103 BASIC REQUIREMENTS

(a) Job analysis. Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:

(1) The basic duties and responsibilities;

(2) The knowledge, skills, and abilities required to perform the duties and responsibilities; and

(3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or

an occupation or group of occupations, having common characteristics.

(b) Relevance. (1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum education requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of any entry position the required relevance may be based on the target position when—

(i) The entry position is a training position or the first of a progressive series of established training and development positions leading to a target position at a higher level; and

(ii) New employees, with a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit factor. This requirement is generally met when an employment practice is relevant to performance in the position to be filled (or in the target position in the case of an entry position).

§ 300.104 APPEALS, GRIEVANCES, AND COMPLAINTS

(a) Employment practices. (1) A candidate who believes that an employment practice which was applied to him and which is administered or required by the Commission violates a basic requirement in § 300.103 is entitled to appeal to the Commission.

(2) An appeal shall be in writing, shall set forth the basis for the candidate's belief that

a violation occurred, and shall be filed with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, no later than 15 days from the date the employment practice was applied to the candidate or the date he became aware of the results of the application of the employment practice. The board may extend the time limit in this subparagraph for good cause shown by the candidate.

(3) An appeal shall be processed in accordance with Subpart D of Part 772 of this chapter.

(b) Examination ratings. A candidate may file an appeal with the Commission from his examination rating or the rejection of his application. The appeal shall be filed and processed in accordance with instructions in Chapter 337 of the Federal Personnel Manual.

(c) Complaints and grievances to an agency. (1) A candidate may file a complaint with an agency when he believes that an employment practice which was applied to him and which is administered or required by the agency discriminates against him on the basis of race, color, religion, sex, or national origin. The complaint shall be filed and processed in accordance with Subpart B of Part 713 of this chapter.

(2) Except as provided in subparagraph (1) of this paragraph, an employee may file a grievance with an agency when he believes that an employment practice which was applied to him and which is administered or required by the agency violates a basic requirement in § 300.103. The grievance shall be filed and processed under the agency grievance system, or a negotiated grievance system, established in accordance with Subpart C of Part 771 of this chapter.

* * * * *

The Equal Opportunity Regulations, Part 713 of 5 C.F.R., as amended in October 1972, provide:

PART 713—EQUAL OPPORTUNITY

Subpart B—Equal Opportunity Without Regard to Race, Color, Religion, Sex, or National Origin

Subpart B of Part 713 Equal Opportunity is revised to implement the Equal Employment Opportunity Act of 1972, 86 Stat. 103, and to strengthen the system of complaint processing. Among others, these changes emphasize the affirmative aspects of agency equal employment opportunity obligations, set out requirements for submission of national and regional plans, extend the time limits for contacting a counselor, provide for the reasonable accommodation to the religious needs of applicants and employees, provide for timely investigation and resolution of complaints including complaints of coercion and reprisal, set out the remedial action available(including back pay), and strengthen the third party complaint system.

General Provisions

Sec.
713.201 Purpose and applicability.
713.202 General policy.
713.203 Agency program.
713.204 Implementation of agency program.
713.205 Commission review and evaluation of agency program operations.

Agency Regulations for Processing Complaints of Discrimination

713.211 General.
713.212 Coverage.
713.213 Precomplaint processing.
713.214 Filing and presentation of complaint.
713.215 Rejection or cancellation of complaint.
713.216 Investigation.
713.217 Adjustment of complaint and offer of hearing.

Sec.
713.218 Hearing.
712.219 Relationship to other agency appellate procedures.
713.220 Avoidance of delay.
713.221 Decision by head of agency or designee.
713.222 Complaint file.

Appeal to the Commission

713.231 Entitlement.
713.232 Where to appeal.
713.233 Time limit.
713.234 Appellate procedures.
713.235 Review by the Commissioners.
713.236 Relationship to other appeals.

Reports to the Commission

713.241 Reports to the Commission on complaints.

Third-Party Allegations

713.251 Third-party allegations of discrimination.

Freedom From Reprisal or Interference

713.261 Freedom from reprisal.
713.262 Review of allegations of reprisal.

Remedial Actions

713.271 Remedial actions.

Right To File a Civil Action

713.281 Statutory right.
713.282 Notice of right.
713.283 Effect on administrative processing.

Authority: The provisions of this Subpart B issued under 5 U.S.C. 1301, 3301, 3302, 7151–7154, 7301; 86 Stat. 111; E.O. 10577; 3 CFR, 1934–58 Comp., p. 218, E.O. 11222, 3 CFR 1964–1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

§ 713.201 PURPOSE AND APPLICABILITY

(a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) Applicability. (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 713.202 GENERAL POLICY

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 713.203 AGENCY PROGRAM

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employee by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

568-706—75——4

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior acomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

§ 713.204 IMPLEMENTATION OF AGENCY PROGRAM

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 713.202 and its program established in accordance with § 713.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of;

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 713.202 and the agency program required to be established under § 713.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or

disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 713.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 713.211 through 713.222;

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency subject to § 713.251.

(7) When authorized by the head of the agency, making the decision under § 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing at his

discretion, the record on any complaint before the decision is made under § 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 713.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor.

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so; and

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to—

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 713.205 COMMISSION REVIEW AND EVALUATION OF AGENCY PROGRAM OPERATIONS

The Commission shall review and evaluate agency program operations periodically, obtain

such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 713.211 GENERAL

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 713.212 through 713.222.

§ 713.212 COVERAGE

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222. (Section 713.251 applies to general allegations by organizations or other third parties.)

§ 713.213 PRECOMPLAINT PROCESSING

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a formal complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the peformance of his duties under this section.

§ 733.214 FILING AND PRESENTATION OF COMPLAINT

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complaintant in writing of all his administrative rights and of his right to file a civil action as set forth in § 713.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances bevond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) Presentation of complaint. At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency

and ne designates another employee of the agency as his representative, the representative, shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 713.215 REJECTION OR CANCELLATION OF COMPLAINT

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 713.281.

§ 713.216 INVESTIGATION

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under

oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the

person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

§ 713.217 ADJUSTMENT OF COMPLAINT AND OFFER OF HEARING

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a

decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 713.231. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complainant, together with the complaint file shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.

§ 713.218 HEARING.

(a) Complaints examiner. The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense

is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the

representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of complaints examiner. In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;
(2) Regulate the course of the hearing;
(3) Rule on offers of proof;
(4) Limit the number of witnesses whose testimony would be unduly repetitious; and
(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) Witnesses at hearing. The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the

complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) Findings, analysis, and recommendations. The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to con-

568-796—75——5

ditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 713.219 RELATIONSHIP TO OTHER AGENCY APPELLATE PROCEDURES

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency, the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

§ 713.220 AVOIDANCE OF DELAY

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 713.218.

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right

of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 713.281.

§ 713.221 DECISION BY HEAD OF AGENCY OR DESIGNEE

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative. When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require

remedial action to be taken in accordance with § 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the complaint file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission of his right to file a civil action in accordance with § 713.281, and of the time limits applicable thereto.

§ 713.222 COMPLAINT FILE

The agency shall establish a complaint file. Except as provided in § 713.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 713.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under §713.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints ex-

aminer's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.

Appeal to the Commission

§ 713.231 ENTITLEMENT

(a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint, or a portion thereof, for reasons covered by § 713.215; or

(2) To cancel his complaint because of the complainant's failure to prosecute his complaint; or

(3) On the merits of the complaint, under § 713.217(c) or § 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

§ 713.232 WHERE TO APPEAL

The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

§ 713.233 TIME LIMIT

(a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

§ 713.234 APPELLATE PROCEDURES

The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.235 REVIEW BY THE COMMISSIONERS

The Commissioners may, in their discretion, reopen and reconsider any previous decision

when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

§ 713.236 RELATIONSHIP TO OTHER APPEALS

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

Reports to the Commission

§ 713.241 REPORTS TO THE COMMISSION ON COMPLAINTS

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

Third Party Allegations

§ 713.251 THIRD-PARTY ALLEGATION OF DISCRIMINATION

(a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c) Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

Freedom From Reprisal or Interferences

§ 713.261 FREEDOM FROM REPRISAL

(a) Complainants, their representatives, and witnesses shall be free from restraint interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

§ 713.262 REVIEW OF ALLEGATIONS OF REPRISAL

(a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 713.214(a)(2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the

charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under § 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

§ 713.271 REMEDIAL ACTIONS

(a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the indi-

vidual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which

backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right To File a Civil Action

§ 713.281 STATUTORY RIGHT

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate U.S. District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint.

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

§ 713.282 NOTICE OF RIGHT

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215 and 713.217, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil

action, and of the 30-day time limit for filing, in any decision under § 713.234.

§ 713.283 EFFECT ON ADMINISTRATIVE PROCESSING

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,

Executive Assistant to the Commissioners.

[FR Doc. 72-18054 Filed 10-20-72; 8:49 am]

U.S. GOVERNMENT PRINTING OFFICE: 1975